CONSTRAJAYA SDN BHD

v.

JOHOR COASTAL DEVELOPMENT SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[ORIGINATING SUMMONS NO: 24-1265-2000]
13 JULY 2001

CONTRACT: *Sale and purchase of land - Breach - Forfeiture of part payment thereof - Whether part payment a deposit - Whether forfeitable - Reasonable compensation - Failure to prove actual loss or damages - Whether fatal - Whether part payment to be refunded - Contracts Act 1950, s. 75*

CONTRACT: *Construction - Sale and purchase agreement - Forfeiture clause - Whether constituted a penalty - Whether void and unenforceable - Contracts Act 1950, s. 75 - Scope and extent*

The plaintiff had entered into two sale and purchase agreements with the defendant to purchase a certain property from the latter. By the agreements, the plaintiff undertook to complete the purchase and pay the full purchase price by way of six instalment payments. The plaintiff paid the first three instalments totalling RM9,018,400, including the initial payment of 12% amounting to RM1,850,400, but failed to pay the balance price. The plaintiff having defaulted, the defendant terminated the agreements and sought to forfeit the sums thus paid in accordance with the terms of the agreements. The plaintiff contended that the defendant was not entitled to forfeit the monies, as the same was a penalty and hence unenforceable under s. 75 of the Contracts Act 1950 ('the Act'), and in the circumstances applied for a declaration to the effect. The issue that arose was whether the part payment of RM9,018,400 herein could be forfeited by the defendant, and in any case, whether the first payment of RM1,850,400 was a deposit and therefore could be forfeited.

Held:

[1] Section 75 of the Act confers upon the court the requisite jurisdiction to ensure that any sum stipulated in the contract must be a reasonable sum before it can be recovered. (p 206 f)

[2] The salient points of the relevant clauses in the agreements showed that the initial payment of 12% was never intended nor regarded to be earnest money or deposit. For the payment to be a deposit it must be regarded as the consideration for the agreement to sell and buy, and not consideration for the conveyance. Further, the term 'deposit' needs to be expressly stated in the agreement. (pp 211 c & 212 a)

[2a] The absence of the word 'deposit' in the agreements, coupled with the repeated usage of the word instalments, showed that the initial payment was not a deposit which is forfeitable, but was a payment made in the nature of instalment towards the purchase price. Since it is an instalment payment and a part payment towards the purchase price, it cannot be forfeited and must be refunded to the plaintiff. (p 212 e-f)

[3] By virtue of the Federal Court decision in *Selva Kumar Murugayah v. Thiagarajah Retnasamy*, there is now no difference between penalty and liquidated damages, and in every case, if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty. It is also clear that, notwithstanding the words "whether or not actual damages or loss is proved to have been caused thereby" in s. 75 of the Act, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the principles in *Hadley v. Baxendale*. (pp 213 h-i & 214 a-b & d-e)

[3a] Applying the principles aforesaid, cls. 8.2 and 16.2 in the agreements, which provided for the forfeiture of the part payment, must be regarded as a penalty and therefore unenforceable and void. Being in the nature of a penalty the defendant must adduce evidence of loss failing which the court cannot ascertain nor award reasonable compensation to the defendant. (p 214 h)

[4] Liquidated damages in the amount as stipulated in cl. 16.2 cannot be forfeited unless this court is satisfied that it is a reasonale sum and for the court to arrive at a reasonable sum there must be adequate material as to the loss suffered. (p 216 f)

[4a] Nowhere has the defendant adduced evidence to show the loss or damage suffered by them. That being so, the court cannot determine the reasonable compensation envisaged by s. 75 of the Act, and consequently, the defendant must effect a full refund of the RM9,018,400 to the plaintiff. (p 217 c)

[Judgment for plaintiff; order accordingly.]

Case(s) referred to:
Bonham Carter v. Hyde Park Hotel Ltd [1948] WN 89 ***(refd)***
Ex parte Barrel LR 10 Ch 512 ***(refd)***
Farrant v. Leburn [1970] WAR 179 ***(refd)***
Hadley v. Baxendale [1854] 9 Exch 341 ***(foll)***
K Umar Kandha Rajah v. EL Magness [1985] 1 MLJ 116 ***(foll)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Larut Matang Supermarket v. Liew Fook Yung [1995] 1 MLJ 375 ***(refd)***
Linggi Plantations Ltd v. Jagatheesan [1972] 1 MLJ 89 ***(foll)***
Maniam v. State of Perak [1957] MLJ 75 ***(foll)***
Mayson v. Clouet [1924] AC 980 ***(foll)***
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(foll)***
Selva Kumar Murugayah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(foll)***
Sun Properties Sdn Bhd v. Happy Shopping Plaza Sdn Bhd [1987] 2 CLJ 423; [1987] CLJ (Rep) 345 SC ***(foll)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***
Wearne Brothers (M) Ltd v. Jackson [1966] 2 MLJ 155 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 75
Rules of the High Court 1980, O. 37

For the plaintiff - En Thisinayagam; M/s Miranda & How
For the defendant - Nazra Abd Kadir; M/s Nik Saghir & Ismail

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:
The plaintiff's claim herein relates to the seeking of declaratory reliefs that the two sale and purchase agreements both dated 13 March 1997 in respect of the property known as Lot 7 and Lot 14, Bahagian C, JB Waterfront City were unlawfully terminated by the notice dated 19 April 2000 and that the defendant is not entitled to forfeit all sums paid as same is a penalty and unenforceable by virtue of s. 75 of the Contracts Act 1950.

In the course of submission the plaintiff conceded that the agreements were lawfully terminated but maintains that they are entitled to a full refund of all sums paid by reason of s. 75 of the Contracts Act in that it amounts to a penalty.

The issue for consideration is the scope and extent of the defendant's entitlement to forfeiture upon an evaluation of the terms of the sale and purchase agreements herein.

It is the plaintiff's contention that the defendant cannot rely on the forfeiture clauses to forfeit the entire sum of RM9,018,400 paid and by virtue of s. 75 of the Contracts Act the court is empowered to adjudicate on the amount forfeited.

Section 75 of the Contracts Act 1950 provides as follows:

> **75. Compensation for breach of contract where penalty stipulated for.**
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Upon perusing the wording thereof it departs from the English Common Law position in that it does away with the distinction between liquidated damages and penalties. In *Wearne Brothers (M) Ltd v. Jackson* [1966] 2 MLJ 155 it was stated:

> the distinction between liquidated damages and penalty has ceased to be of great legal importance because the result in either case is that the Court must determine reasonable compensation

By reason of the abrogation of the distinction between liquidated damages and penalties s. 75 Contracts Act provides that every fixed sum will be treated as penalty – *Maniam v. The State of Perak* [1957] MLJ 75; *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89.

Hence s. 75 Contracts Act confers on the court the requisite jurisdiction to ensure that any sum stipulated in the contract must be a reasonable sum before it can be recovered.

As the issue herein relates to the amount of the forfeiture the relevant clauses in the sale and purchase agreements dated 13 March 1997 are reproduced hereunder:

> **Section 2.1 Agreement to Sell and Purchase**
>
> In consideration of the purchase price which shall be paid by the purchaser to the vendor in accordance with the second schedule hereof, the vendor shall sell and the purchaser shall purchase the said property as a vacant land together with infrastructure works and with vacant possession together with the rights title and interest in and to the said property free from

encumbrances but subject to all conditions express or implied that are contained (when issued) in the document of title to the said property and upon the terms and conditions contained in this agreement.

Section 2.2 Conditional Agreement

The effectiveness of this agreement is conditional upon the vendor's receipt of payment by the purchaser of the first payment within three (3) months from the date of this agreement. In the event that the first payment is not paid for any reason whatsoever within three (3) months from the date of this agreement or such other period as may be extended at the sole discretion of the vendor, then this agreement shall terminate automatically without any act of any party and thereafter neither party shall have any claim whatsoever against the other.

Section 4.1 Payment

(a) The balance purchase price of the said property shall be paid by the purchaser to the vendor by instalments at such time, stages and manner as more particularly set out in the second schedule of this agreement.

(b) WITHOUT PREJUDICE to the vendor's rights under this agreement, if any of the instalments referred to in the second schedule shall remain unpaid by the date due for payment as set out in the second schedule and in this respect time shall be the essence of this agreement, then interest on such unpaid instalment or instalments shall commence to run immediately thereafter and shall be payable by the purchaser to the vendor. Such interest shall be calculated from day to day at the rate of twelve per centum (12%) per annum both before and after judgement provided that nothing herein contained shall prejudice the rights of the vendor under art. VIII hereof. AND for the avoidance of any doubt, the purchaser shall not be entitled to resort to its rights under art. IX hereof.

Section 8.1 Default of Purchaser

If the purchaser:

(a) fails for any reason to pay any instalment payable (other than the first payment) in accordance with the second schedule of this agreement and/or any interest payable thereon; and/or

(b) fails for any reason to pay any sum or sums payable (other than the first payment) under this agreement within the time stipulated for payment; and/or

a If the purchaser … (a) fails for any reason to pay any instalment payable (other than the first payment) in accordance with the second schedule of this agreement and/or any interest payable thereon and/or (b) fails for any reason to pay any sum or sums payable (other than the first payment) under this agreement within the time stipulated for payment; … then vendor may give notice ... requiring b the purchaser to remedy the default within (14) days from the date of the notice. If purchaser fails to remedy the relevant default within the period specified … the vendor… shall be entitled … (B) to terminate this agreement in which case s. 8.2 hereof shall apply.

c Upon the termination of this agreement under s. 8.1 (B) hereof (b)…all instalments previously paid by the purchaser to the vendor including the first payment and any interest thereon paid as at the date of termination shall be forfeited to the vendor absolutely, except where the termination occurs within four (4) months from the date of this agreement, in which event an amount equal to 10% of the purchase price shall be forfeited to the vendor absolutely, d and all instalments previously paid by the purchaser to the vendor including the first payment after deducting the amount forfeited shall be returned to the purchaser without interest.

Section 16.2 Reasonable Compensation

e Both parties hereby unconditionally and irrevocably acknowledges that the sums stipulated in this agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

f **SECOND SCHEDULE**

(which is to be taken, read and construed as an integral part of this Agreement)

SCHEDULE OF PAYMENT

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NO.	TIME FOR PAYMENT	PERCENTAGE
1.	Immediately upon the signing of this Agreement	12%
2.	Within three (3) months from the date of this Agreement	20% (First Payment)
3.	Within six (6) months from the date of this Agreement	20%

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4.	Within nine (9) months from the date of this Agreement	20%
5.	Upon issuance of document of title	20%
6.	Upon completion of Infrastructure Works	8%

Items 5 and 6 need not be in the above order

To summarise the position, the gravamen as regards payment under the two sale and purchase agreements dated 13 March 1997 (hereinafter referred to as "the SPAs") are as follows:

(i) immediately upon signing of the SPAs the plaintiff shall pay to the defendant 12% of the purchase price (hereinafter referred to as "the initial payment") (see item 1 of the Second Schedule to the SPAs).

(ii) if the first payment of 20% is not paid within three months from the date of the SPAs after payment of the initial payment, the SPAs shall terminate automatically without the act of any party and thereafter neither party shall have any claim whatsoever against the other (see s. 2.2 of the SPAs).

(iii) if the SPAs proceed after payment of the initial payment and the first payment and if termination occurs within four (4) months after the date of the SPAs, then the defendant is only entitled to forfeit 10% of the purchase price (see s. 8.2(b) of the SPAs).

(iv) if the SPAs proceed further and termination occurs four (4) months after the date of the SPAs, the defendant is entitled to forfeit all instalments previously paid including the first payment (see s. 8.2(b) of the SPAs).

From the summary aforesaid the issue for determination by this court is the amount that is forfeitable under the SPAs, namely whether:

1. The defendant is entitled to forfeit the sum of RM1,850,400 being the 12% of the purchase price described as the initial payment therein.

2. The defendant is entitled to forfeit the entire sum paid amounting to RM9,018,400 which is described in the SPAs as all instalments previously paid including the first payment.

It is not in dispute that the SPAs was lawfully terminated because of the failure by the purchaser to effect the 4th instalment payment and also that the termination was done some three years after the date of the SPAs.

Coming to the first issue, namely whether the initial payment of RM1,850,400 representing 12% of the purchase price is forfeitable, it is essential to determine the nature of the payment as envisaged by the SPAs.

The defendant contends that the 12% initial payment is for all intents and purposes a deposit and as such forfeitable and s. 75 Contracts Act has no application whatsoever in relation to forfeitable deposits as it does not amount to a penalty for which the court can exercise its powers to ascertain whether the sum is reasonable or not.

The meaning of deposit was expounded by James LJ in *Ex-parte Barrel* L.R. 10 Ch 512:

> What is the deposit? The deposit, as I understand ... is a guarantee that the contract shall be performed ... If the sale goes on … it goes in part payment of the purchase money for which it is deposited; but if on default of the purchaser the contract goes off, that is to say if he repudiates the contract, then ... he can have no right to recover.

From the meaning aforesaid the very nature of it being regarded as a guarantee of performance as well as payment on account its forfeiture can never be regarded as a penalty for the applicability of s. 75 of the Contracts Act.

Support for the proposition that s. 75 of the Contracts Act is not applicable to deposits is found in the Privy Council case of *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89 where the court in determining the issue on whether a vendor was entitled to forfeit a deposit paid following non-completion of purchase of land by purchaser though the vendor was not in a position to prove actual damage flowing from the purchaser's breach held that the rule relating to relief against penalty does not apply to deposit cases. Lord Hailsham LC in delivering the judgment of the Board at p. 92 stated:

> The reason in substance was that, though it is true that (Section 75) was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the equitable rule to all cases, whether the sum provided in the contract was in substance a penalty or a genuine pre-estimate of the damage likely to be suffered these technical rules had developed entirely separately from the law relating to deposits and for a very long time no one thought that the section in the Contracts Act which superseded them had any application to the deposit cases, or at least, whenever the point was argued, it was rejected by the Indian Courts.

Turning to the facts of the case herein an appraisal of the relevant clauses of the SPAs exhibited as "CYM1" and "CYM2" in the supporting affidavit of Cheung Yuen Man in encl. 3 reveals the following salient features.

1. The payment of the initial payment of RM1,850,400 amounting to 12% of the purchase price was treated as the first instalment (out of six instalments) and part payment of the purchase price – cl. 4.1(b) and the second schedule.

2. The initial payment was not for consideration of the contract as appears by the wording in cl. 2.1 the operative words of which are "in consideration of the purchase price which shall be paid by the purchaser to the vendor in accordance with the second schedule, hereof, the ..."

The salient features of the clauses aforesaid would go to show that the initial payment of 12% was never intended nor regarded to be earnest money or deposit.

For the payment to be a deposit it must be regarded as the consideration for the agreement to sell and buy and not consideration for the conveyance. As was stated by Wickham J in *Farrant v. Leburn* [1970] WAR 179 at p. 183:

> Here the purchaser made an unconditional promise to pay a deposit immediately, and although if the contract was completed the moneys would according to ordinary principles be credited towards the purchase price and until then would constitute earnest for performance, the agreement to pay was not in consideration of conveyance but in consideration of the contract.

The aforesaid rationale was adopted with approval by our Federal Court in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23.

Again in *Sun Properties Sdn Bhd v. Happy Shopping Plaza Sdn Bhd* [1987] 2 CLJ 423; ([1987] CLJ (Rep) 345) where the deposit was worded as consideration for the contract Hashim Yeop Sani SCJ (as his Lordship then was) stated at p. 425 (p. 347):

> The expression used in clause 1 of the sale agreement in the instant case is a standard expression used in all sale agreements where money is paid as a deposit and part payment of the purchase price. The expression "as a deposit and part payment of the purchase money" always relate to two alternatives in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken as part payment.

Negativing the 12% initial payment as a deposit is further supported by the wording in cl. 8.2(b) which in alluding to a 10% figure as forfeiture for termination occurring within four months makes no reference whatsoever to the initial payment of 12% for surely if it was intended to be the sum to be forfeited as a deposit the figure of 10% would not be stipulated. The fact that the lower percentage of 10% is mentioned clearly excludes the categorisation of the 12% initial payment as a deposit.

Based on established precedents the courts in Malaysia have consistently held that it is a pre-requisite for the term deposit to be expressly stated in the agreement in order for it to qualify as such. The common thread which runs in all the cases emanating from *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89; *K. Umar Kandha Rajah v. E.L. Magness* [1985] 1 MLJ 116; *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 CLJ 423; [1987] CLJ (Rep) 345; *Jaques (International) Sdn Bhd*, is that the payment therein was expressly stated as a deposit.

Interestingly the defendants herein are not disputing and in fact concedes that the word deposit is not mentioned in the SPAs but urges the court to have regard to the terms of the SPAs as a whole and the surrounding circumstances and the nature and mode of payment in ascertaining whether the initial payment is a deposit.

Though payment of a sum at the point of time of formation of a contract would be a pointer towards the payment being a deposit, it must be emphasised that it is only one of several pointers – other factors must be looked into before the payment could be categorised or classified as a deposit.

The factors to be taken into account in determining whether the payment amounts to a deposit as propounded by the Federal Court in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 are the labels attached; reasonableness of the sum stipulated; distinguishing in terms between deposits and instalments in the contract, intention of the parties and surrounding circumstances.

Applying the factors aforesaid to the terms of the SPAs herein it is my judgment that the absence of the word deposit coupled with the repeated usage of the word instalments clearly establishes that the initial payment was not a deposit which is forfeitable as it was a payment made in the nature of instalments towards the purchase price. Since it is in the nature of instalment payment as part payment towards the purchase price it cannot be forfeited by the defendant herein and must be returned or refunded to the plaintiff herein – *Mayson v. Clouet* [1924] AC 980 at p. 987 (which was approved by the Federal Court in *Morello*'s case) where Lord Dunedin stated:

> They therefore turn to the contract. This specially distinguishes in terms between deposit and instalments. It then specially deals in clause 13 with what is to happen if the purchasers are in default. The deposit is forfeited, and that is all. It would seem to their Lordships quite clear that the instalments are not to be forfeited.

At the point of repeating myself I need to emphasise that in all the previous cases where courts have allowed the forfeiture of deposit, the sum has always been categorised as a deposit and not as part payment as expressed herein.

I shall now proceed to address the second issue namely whether the terms of the agreements herein entitle the defendant to forfeit the entire sum of RM9,018,400 paid up to date.

Two pertinent points in relation to the sum of RM9,018,400 is that it represents 58.49% of the purchase price and the said amount has been in the defendant's possession and utilisation since 1998.

The defendant sought to forfeit the entire sum of RM9,018,400 by invoking cl. 16.2 of the SPAs which states:

> **Section 16.2 Reasonable Compensation**
>
> Both parties hereby unconditionally and irrevocably acknowledges that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

The defendant contends that by reason of the clause the plaintiff has unconditionally and irrevocably acknowledged the forfeiture of all instalments paid as constituting reasonable compensation. Having freely agreed to the sum being treated as reasonable compensation the plaintiff is now estopped and cannot be permitted to resile from the contractual position and say that the sums agreed to be forfeited is unconscionable or tantamount to a penalty. The defendant's stand is that even though the clause may amount to be a bad bargain for the plaintiff nevertheless the court should uphold the sanctity and not destroy the contract.

The plaintiff on the contrary submits that since the SPAs repeatedly uses the term instalments and the second schedule expressly and in no uncertain terms stipulates that all payments therein are instalment payments it establishes beyond doubt that they are part payments and hence s. 75 Contracts Act is applicable and the court is seised with jurisdiction to adjudicate on the amount to be forfeited.

A clause similar in wording to cl. 16.2 herein came up for construction in the Federal Court case of *Selva Kumar a/l Murugayah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 374. The Federal Court held that by reason of s. 75 of the Contracts Act there is now no difference between penalty and liquidated damages and in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty.

His Lordship Peh Swee Chin FCJ adopted the comments in *Maniam v. State of Perak* [1957] MLJ 75 made by Thomson J at p. 76:

> In the first place in this country there is no difference between penalty and liquidated damages ... As is said in Pollock and Mulla at p. 410, "this section boldly cuts the most troublesome knot in the common law doctrine of damages." In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty – see *Bhai Panna Singh v. Bhai Arjun Singh* AIR [1929] PC 179.

His Lordship then concluded at p. 823:

> It is obvious that any submission as to whether a certain clause in a contract is a penalty or liquidated damages is an exercise in futility. Clause 15(b) of the agreement before us is therefore unenforceable and is to be regarded as a penalty, void in equity as being unconscionable.

Since under s. 75 Contracts Act any sum named in the contract is to be treated as a penalty it behoves on the court to determine what is the reasonable compensation "whether or not actual damages or loss is proved to have been caused thereby."

In construing the words in inverted commas aforesaid the court ruled that it must be given a restricted construction. Hence despite the words, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale* [1854] 9 Exch 341; Any failure to prove such damages will result in the refusal of the court to award such damages.

The Federal Court further held that for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question will apply. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play. In any event, the damages awarded must not exceed the sum so named in the contractual provisions.

My understanding of the Federal Court decision is that a clause so worded as cl. 16.2 herein are to be regarded as a penalty and therefore unenforceable and void. To qualify for compensation and hence the right to forfeit the defendant herein must prove the damages they have suffered. Applying the principle established by *Selva Kumar*'s case it is my judgment that cls. 8.2 and 16.2 herein being a penalty is unenforceable and void. Being in the nature of a

penalty the defendant herein must adduce evidence of loss failing which the courts cannot ascertain nor award reasonable compensation not exceeding the amount stipulated in the penalty.

In this connection I would also like to touch on the defendant's contention that cls. 8.2 and 16.2 ought to be regarded as a "genuine pre-estimate of damage suffered by them" and hence they need not prove such loss pursuant to the case of *Larut Matang Supermarket v. Liew Fook Yung* [1995] 1 MLJ 375.

I must dismiss the contention as one devoid of merits. I agree with the plaintiff's counsel's written submission that such a contention is not only misconceived but wrong in law. That it is both misconceived and wrong in law is evident by the comment made by his Lordship Peh Swee Chin FCJ in *Selva Kumar*'s case on *Wearne Brothers (M) Ltd v. Jacksons* [1966] 2 MLJ 155. His Lordship at para g p. 382 stated:

> The view of Lord Atkin was adopted in our High Court case *viz Wearne Brothers (M) Ltd v. Jackson* [1966] 2 MLJ 155, though the learned trial judge, while correctly holding that in a provision in a contract amenable to the section in question, the plaintiffs must prove damages they had suffered erred in saying further (at page 156) that "unless the sum … is a genuine pre-estimate." It must be remembered that the expression "liquidated damages" is the name for the contracting parties' supposedly genuine pre-estimate of the loss to the innocent contracting party when the contract is broken by the other. Every such provision to which the section in question is applicable is to be regarded effectually as a penalty and is therefore void or unenforceable.

The statement of his Lordship aforesaid puts paid to the defendant's contention as there is no such thing as a genuine estimate of loss by the insertion of a named sum, as the named sum must be regarded as a penalty.

From the distilled principles aforesaid it is my judgment that liquidated damages in the amount as stipulated in cl. 16.2 cannot be forfeited unless this court is satisfied that it is a reasonable sum and for the court to arrive at a reasonable sum there must be adequate material as to the loss suffered which must be furnished by the defendant herein.

From the evidence adduced has the defendant discharged the onus of proving the loss suffered?

In approaching the question this court should not be oblivious of the restrictive construction to be placed on the words "whether or not actual damage or loss is proved to have been caused thereby" and the onus of proof of actual loss/ damage where there is evidence of loss but court finds it difficult to assess damages as there is no known measure of damages employable and the loss is not too remote and could be assessed by settled rules.

In such a situation it is incumbent upon the defendant to bring evidence to prove damages for the actual loss or damage suffered and any failure to adduce would result in this court refusing to award such damages. Poh Swee Chin FCJ in *Selva Kumar*'s case at p. 385 stated:

> We hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence, or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages despite the words in question.

In *Selva Kumar*'s case though the Federal Court acknowledged that there are some actual loss/damage that could be assessed by settled rules nevertheless because of the failure by the innocent party to bring evidence to prove damages for the actual loss the Federal Court ruled that damages have not been proved and ordered the refund of the money forfeited.

The law is trite in that the person claiming damages must prove their damage. His Lordship Mohamad Azmi FCJ in *Morello*'s case above in referring to the case of *Bonham Carter v. Hyde Park Hotel Ltd* [1948] WN 89 stated at p. 606:

> ... it is not enough to write down the particulars and so to speak, throw them at the head of the court saying: "This is what I have lost, I ask you to give me these damages." They have to prove it ...

Turning to the factual matrix of this case I have scrutinised the defendant's affidavit jawapan in encl. 6 and nowhere has the defendant adduced evidence to show and/or prove the loss/damage nor the amount of loss/damage suffered by them. Applying the principle established in *Selva Kumar*'s case I rule that the defendants have failed to prove the actual loss or damage suffered by them and by reason thereof the court cannot determine the reasonable compensation envisaged by s. 75 of Contracts Act.

The defendant in fact acknowledged their failure to adduce evidence to prove the damage suffered by them and attempted to salvage their position by requesting the court to allow them the opportunity of assessing damages in a separate proceedings purportedly under O. 37 Rules of the High Court 1980 which appears to be the order regulating assessment of damages.

On this score I subscribe to the plaintiff's submission that the assessment of damages as envisaged by O. 37 is predicated by proof of loss resulting in a judgment being obtained. In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 the court held that it is elementary law that there can be no assessment of damages in the absence of a judgment granting damages.

As no evidence has been led by the defendant as regards the loss suffered by them and no judgment obtained in respect of same the defendant cannot avail themselves of the provision of O. 37 Rules of the High Court 1980. To permit the defendant at this stage to proceed with assessment (if same is permissible) is to provide the defendant in the words of Edgar Joseph Jr. SCJ in *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476 "a second opportunity to prove a point which it had failed to do so at the trial."

To summarise the position it is my judgment that in the light of my finding that the initial payment of 12% of the purchase price is not a deposit and payment of the entire sum is in the nature of part payments towards the purchase price and the defendant having failed to adduce evidence as to the losses/damages suffered by them and taking into consideration that the entire sum was in the defendants' possession and disposal since 1998 I accordingly order the defendant to effect a full refund of the sum of RM9,018,400 with interest thereon from date of judgment until settlement at 8% per annum and costs.